

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #3 □

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2004 AUG 26 A 10:07

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia Ethics Commission TITLE NUMBER: 158

CITE AUTHORITY: W.Va. Code § 6B-2-5a et. seq.

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

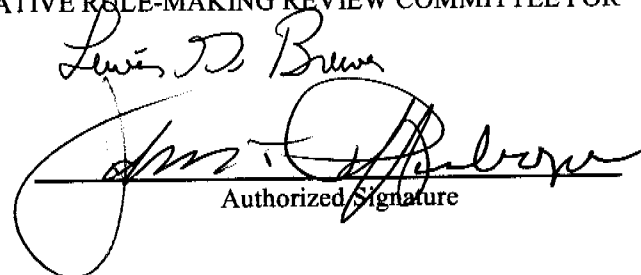
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 13

TITLE OF RULE BEING PROPOSED: Code of Conduct for Administrative Law Judges

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Lewis D. Brown

Authorized Signature



STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION
4TH FLOOR - LITTON BUILDING
1207 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301-1838
(304) 558-0664
FAX (304) 558-2169

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2004 AUG 26 A 10:05

OFFICE WEST VIRGINIA
SECRETARY OF STATE

RICHARD M. ALKER
EXECUTIVE DIRECTOR

August 26, 2004

VIA HAND DELIVERY

The Honorable Joe Manchin, III
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Re: Legislative Rules

Dear Secretary Manchin,

I am enclosing an original and fifteen copies of the documents listed below for filing. The proposed rules establish a code of conduct for state administrative law judges. I will provide copies to the Legislative Rule-Making Review Committee once they are marked filed by your office.

The documents enclosed consist of the following:

1. Notice of Agency Approval of a Proposed Rule and Filing with the Legislative Rule-Making Review Committee;
2. Statement of Circumstances and Brief Summary of the rule;
3. Brief Summary of comments received, agency response and amendments;
4. Proposed Rule;
5. Fiscal Note;
6. Questionnaire.

Thank you very much for your assistance. If you have any questions, or need any additional information, please do not hesitate to give me a call.

Very truly yours,

Lewis G. Brewer
Executive Director

Enclosures

BRIEF SUMMARY OF PROPOSED RULE
Title 158, series 13

The rule creates a code of conduct for administrative law judges. The rule is based in part upon the National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges (1999) and the American Bar Association Model Code of Conduct for State Administrative Law Judges (1995).

The rule prescribes conduct for administrative law judges and other persons in state government who have the authority to conduct an administrative adjudication. It also provides a mechanism for applying for an advisory opinion.

The rule creates a procedure for filing complaints against persons and sets forth penalties for persons found to be in violation of the Code of Conduct.

STATEMENT OF CIRCUMSTANCES

The Legislature passed an Act during the 2004 session which directs the West Virginia Ethics Commission, in consultation with the West Virginia State Bar, to propose rules for legislative approval establishing a code of conduct for state administrative law judges. (W.Va. Code § 6B-2-5a *et. seq.*) The legislation enumerates the major provisions which should be incorporated into the code of conduct. It also directs that the rule should provide for appropriate civil penalties and sanctions for violations.

The Act also directs the Ethics Commission to consider model codes of conduct for state administrative law judges as drafted by the National Association of Administrative Law Judges and the American Bar Association.

TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION

FILED

SERIES 13
CODE OF CONDUCT FOR ADMINISTRATIVE LAW JUDGES

2004 AUG 26 A 10:07
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§158-13-1. General.

1.1. Scope. -- These legislative rules establish a code of conduct for state administrative law judges.

1.2. Authority. -- W. Va. Code §6B-2-5a.

1.3. Filing Date. -

1.4. Effective Date. -- July 1, 2005

§158-13-2. Interpretation.

2.1. This rule is taken, in part, from the National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges (1999) and the American Bar Association Model Code of Conduct for State Administrative Law Judges (1995). In interpreting this rule, the Ethics Commission shall consider the commentaries contained in these model codes.

§158-13-3. Definitions.

3.1. "State administrative law judge": any public employee, public officer, or contractor functioning as a hearing officer, referee, trial examiner or other position in state government to whom the authority to conduct an administrative adjudication has been delegated by an agency or by statute, and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes or rules, but does not include any person whose conduct is subject to the code of judicial conduct promulgated by the West Virginia supreme court of appeals.

3.2. "Compensation": any money, thing of value or financial benefit. The term "compensation" does not include reimbursement for actual reasonable and necessary expenses incurred in the performance of one's official duties.

3.3. "Complainant": a person who files a complaint with the ethics commission.

3.4. "Respondent": a person against whom a complaint has been filed with the ethics commission.

3.5. "De minimis": an insignificant interest that could not raise reasonable question as to an administrative law judge's impartiality.

3.6. "Political organization": a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

§158-13-4. Standards of Conduct.

4.1. A state administrative law judge shall uphold the integrity and independence of the administrative judiciary.

4.1.a. An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this rule should be construed and applied to further that objective.

4.1.b. The fact that an administrative law judge rules in favor of the agency by which he or she is employed or serves under contract, standing alone, does not establish a lack of independence.

4.1.c. The compensation of an administrative law judge may not be conditioned upon the outcome of a proceeding before that judge.

4.1.d. No provision in this rule prohibits an agency or administrative judiciary, in the interest of uniformity and consistency, from establishing policies interpreting case law, statutory law, and legislative rules, or from establishing operational policies.

4.2. A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities.

4.2.a. An administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

4.2.b. An administrative law judge shall not allow family, social, political, employment or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that

they are in a special position of influence. A judge shall not testify voluntarily as a character witness.

4.2.c. An administrative law judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion, or national origin. For the purposes of this section, an "organization which practices invidious discrimination" shall mean any organization which arbitrarily excludes persons from membership upon the basis of race, gender, religion, or national origin. The term "organization" shall not include, however, an association of individuals dedicated to the preservation of religious, ethnic, historical, or cultural values of legitimate common interest to its members; or an intimate, distinctly private association of persons whose membership limitations would be entitled to constitutional protection.

4.3. A state administrative law judge shall perform the duties of the office impartially and diligently.

4.3.a. The judicial duties of an administrative law judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

4.3.b. Adjudicative responsibilities.

4.3.b.1. An administrative law judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, employment status or fear of criticism.

4.3.b.2. An administrative law judge shall maintain order and decorum in proceedings.

4.3.b.3. An administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers or other representatives, staff members and others subject to the judge's direction and control.

4.3.b.4. An administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law. An administrative law judge shall not initiate, permit or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

4.3.b.4.A. Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

4.3.b.4.A.1. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

4.3.b.4.A.2. the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

4.3.b.4.B. A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

4.3.b.4.C. A judge may consult other judges and support personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

4.3.b.4.D. A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

4.3.b.4.E. Decisions of an administrative law judge shall clearly identify the person or persons responsible for holding the hearing and issuing the final order or decision, and shall be based exclusively on evidence in the record of the proceeding, material that has been officially noticed, and material which agency policy or applicable statutes ordinarily permit consideration or reference.

4.3.b.5. An administrative law judge shall require participants in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This provision does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

4.3.b.6. An administrative law judge shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair hearing. The judge shall require similar abstention on the part of agency personnel subject to the judge's direction and control. This provision does not prohibit an

administrative law judge from making public statements in the course of their official duties or from explaining for public information the procedures of the agency. Further, this provision does not apply to proceedings in which the judge is a litigant in a personal capacity.

4.3.b.7. An administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

4.3.b.8. An administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge.

4.3.b.9. An administrative law judge shall not be subject to undue or improper influence from the head of an agency whose decision is being reviewed.

4.3.c. Administrative responsibilities.

4.3.c.1. An administrative law judge shall diligently discharge assigned administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and facilitate the performance of the administrative responsibilities of other state administrative law judges.

4.3.c.2. An administrative law judge shall require staff and other persons subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

4.3.c.3. An administrative law judge shall take appropriate action or initiate appropriate disciplinary measures against a state administrative law judge, lawyer, representative or others for unprofessional conduct of which the judge may become aware. Appropriate action may include communication with the state administrative law judge, lawyer or representative, who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority, or other agency or body.

4.3.d. Disqualification.

4.3.d.1. An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

4.3.d.1.A. the administrative law judge has a personal bias or prejudice concerning a party or a party's lawyer or other representative involved in the proceeding;

4.3.d.1.B. the administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. Ordinarily, a lawyer in a governmental agency is not considered to have an association with other lawyers employed by that agency within the meaning of this provision;

4.3.d.1.C. the administrative law judge has served in other governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

4.3.d.1.D the administrative law judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a more than *de minimis* financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

4.3.d.1.E. the administrative law judge or the judge's spouse or a person within the third degree of relationship to either of them or the spouse of such a person:

4.3.d.1.E.1. is a party to the proceeding, or an officer, director or trustee of a party;

4.3.d.1.E.2. is acting as a lawyer or representative in the proceeding;

4.3.d.1.E.3. is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

4.3.d.1.E.4. is to the judge's knowledge likely to be a material witness in the proceeding.

4.3.d.2. An administrative law judge should be aware of his or her personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of his or her spouse and minor children residing in the judge's household.

4.3.d.3. For the purposes of this section, the following words or phrases shall have the meaning indicated:

4.3.d.3.A. the degree of relationship is calculated according to the civil law system;

4.3.d.3.B. "fiduciary" includes such relationships as executor, administrator, trustee and guardian;

4.3.d.3.C. "financial interest" means ownership of more than a *de minimis* legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

4.3.d.3.C.1. ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the state administrative law judge participates in the management of the fund;

4.3.d.3.C.2. an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

4.3.d.3.C.3. the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

4.3.d.3.C.4. ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

4.3.d.3.C.5. "proceeding" includes pre-hearing or other stages of litigation.

4.3.e. Remittal of disqualification.

4.3.e.1. An administrative law judge disqualified by the means of §4.3.d may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers or representatives, independently of the judge's participation, all agree that the judge should not be disqualified and the judge is willing, the administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

4.4. A state administrative law judge may engage in activities to improve the law, the legal system, and the administration of justice.

4.4.a. An administrative law judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so doubt is not cast on the capacity to decide impartially any issue that may come before the judge:

4.4.a.1. Speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice.

4.4.a.2. May appear at a hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, unless otherwise prohibited by law.

4.4.a.3. May serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. An administrative law judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

4.5. A state administrative law judge shall regulate the judge's extra-judicial activities to minimize the risk of conflict with judicial duties.

4.5.a. Extra-judicial activities in general.

4.5.a.1. An administrative law judge shall conduct all of the judge's extra-judicial activities so that they do not:

4.5.a.1.A. cast reasonable doubt on the judge's capacity to act impartially as a judge;

4.5.a.1.B. demean the judge's office; or

4.5.a.1.C. interfere with the proper performance of the judge's duties.

4.5.b. Avocational activities.

4.5.b.1. An administrative law judge may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational activities.

4.5.c. Civic and charitable activities.

4.5.c.1. An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

4.5.c.1.A. An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.

4.5.c.1.B. An administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization.

4.5.d. Financial activities.

4.5.d.1. An administrative law judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's official position or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.

4.5.d.2. Subject to the requirements in subsection 4.5.d.1 of this rule, an administrative law judge may hold and manage personal investments, including real estate, and engage in other remunerative activity.

4.5.d.3. An administrative law judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as judges can do so without serious financial detriment, judges shall divest themselves of investments and other financial interests that might require frequent disqualification.

4.5.d.4. Neither an administrative law judge nor a member of the family residing in the judge's household should accept a gift, bequest, favor or loan from anyone except as follows:

4.5.d.4.A. An administrative law judge may accept a gift incident to a public testimonial to the judge, books supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse to attend a function or activity devoted to the improvement of the law, the legal system or the administration of justice;

4.5.d.4.B. An administrative law judge or a member of the family residing in the household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative or close personal friend; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not administrative law judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

4.5.d.4.C. An administrative law judge or a member of the family residing in the household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, or the gift is otherwise consistent with relevant agency rules and is reported to the extent required by such rules and other applicable laws.

4.5.d.5. For purposes of this section "member of the family residing in the household" means any relative of the administrative law judge by blood or marriage, or a person treated by a judge as a member of the family, who resides in the household.

4.5.d.6. An administrative law judge is not required by this rule to disclose income, debts or investments, except as provided by law.

4.5.d.7. Information acquired by administrative law judges in their judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

4.5.e. Fiduciary activities.

4.5.e.1. An administrative law judge shall not serve as an executor, administrator, trustee, guardian or other fiduciary if such service will interfere with the proper performance of judicial duties or if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in an agency in which the judge serves or one under its appellate jurisdiction. While acting as a fiduciary, an administrative law judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

4.5.f. Arbitration.

4.5.f.1. An administrative law judge may act as an arbitrator or mediator if such activity does not affect the independent professional judgment of the judge or the conduct of

his official duties. An administrative law judge shall not be an arbitrator or mediator over a matter which the judge may later preside.

4.5.g. Practice of law.

4.5.g.1. Subject to applicable law and relevant agency rules, an administrative law judge may practice law if such activity would neither affect the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties. An attorney who is an administrative law judge shall not accept the representation of a client who is a litigant before the tribunal for whom the administrative law judge serves or if there is a likelihood that such person will appear before the judge. An administrative law judge shall not practice law before the administrative tribunal for which the judge serves.

4.5.h. Extra-judicial appointments.

4.5.h.1. An administrative law judge may accept appointment to a governmental committee, commission or other position that is concerned with issues of policy on matters which may come before the judge if such appointment neither affects the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties.

4.6. A state administrative law judge shall limit compensation received for quasi-judicial and extra-judicial duties.

4.6.a. An administrative law judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this rule, if the source of such payments does not give the appearance of influencing the judge in the judge's official duties or otherwise give the appearance of impropriety, subject to the following restrictions:

4.6.a.1. Compensation.

4.6.a.1.A. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not an administrative law judge would receive for the same activity.

4.6.a.2. Expense reimbursement.

4.6.a.2.A. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the administrative law judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

4.7. A state administrative law judge shall refrain from political activity inappropriate to the office.

4.7.a. Consistent with applicable statutes and relevant agency rules, an administrative law judge shall not:

4.7.a.1. publicly display any campaign paraphernalia in any area where judicial activities are conducted or knowingly permit any such display;

4.7.a.2. personally solicit funds for a political organization or political candidate, or be compelled to pay an assessment to a political organization or candidate or purchase tickets for political dinners or other similar functions.

4.7.b. A full-time administrative law judge shall either resign from office or take an approved leave of absence prior to becoming a candidate in either a party primary or a general election for any elected public office, or serving in any elected public office.

4.7.b.1. For purposes of this rule, a full-time administrative law judge becomes a candidate for an elected public office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support.

4.7.b.2. This rule does not prohibit a part-time administrative law judge from seeking election to or serving in any elected public office.

4.7.c. An administrative law judge may engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice, or as expressly authorized by law.

§158-13-5. Advisory Opinions.

5.1. The chairman of the West Virginia Ethics Commission shall appoint from the membership of the commission a subcommittee of three persons designated as the West Virginia Ethics Commission Committee on Standards of Conduct for Administrative Law Judges. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

5.2. In appointing the committee, the chairman of the commission shall not appoint all members of the same political affiliation.

5.3. Any person whose conduct is governed by the provisions of this code of conduct may make application for an advisory opinion from the commission's Committee on Standards of Conduct for Administrative Law Judges. All applications for advisory opinions shall be in writing and be directed to the committee at 1207 Quarrier Street, Suite 407, Charleston, West Virginia 25301.

5.4. All applications for advisory opinions must contain the name, address and telephone number of the requester in the event additional information is needed.

5.5. All applications for advisory opinions should fully describe the applicant's official position, employment, or status under this rule.

5.6. All applications for advisory opinions should contain an explanation or paragraph summarizing the conduct for which the application is being made.

5.7. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion.

5.8. All advisory opinions issued pursuant to this rule will be submitted to the Secretary of State for publication and indexing in the Code of State Rules.

5.9. Before an advisory opinion is made public, any material which may identify the person who is the subject of the opinion, shall to the fullest extent possible, be deleted and the identity of the person shall not be revealed.

5.10. A person subject to the provisions of this rule may rely upon an advisory opinion of the committee, and any person acting in good faith reliance on any such opinion shall be immune from the sanctions provided in this rule.

§158-13-6. Filing Verified Complaints.

6.1. Any person may file a verified complaint with the committee regarding the conduct of a person or persons subject to this rule. A verified complaint is one written and duly verified by oath or affirmation before a notary public.

6.2. A duly verified complaint must be filed with the committee at 1207 Quarrier Street, Suite 407, Charleston, West Virginia 25301.

6.3. The executive director or his or her designee shall within three working days of receipt in the committee's office acknowledge the verified complaint by first class mail.

§158-13-7. Acceptance or Dismissal of Complaints.

7.1. In considering a complaint, the committee shall act in the capacity of an investigative panel. The investigative panel must first determine whether the allegations stated in the complaint, if taken as true, would constitute a material violation of this rule.

7.2. If two members of the investigative panel determine that the complaint does not contain allegations which would constitute a material violation of this rule, then the investigative panel shall dismiss the complaint by order. A copy of the order shall be sent to the complainant by first class mail.

7.3. If the investigative panel determines that the allegations of the complaint, if taken as true, would constitute a material violation of this rule, then the executive director or his or her designee shall give notice of the initiation of an investigation (Notice of Investigation) by the panel to the complainant and respondent.

7.4. The Notice of Investigation, accompanied by a copy of the complaint, shall be mailed to the parties and be sent to the respondent by certified mail, return receipt requested, marked "Addressee only, personal and confidential."

7.5. The Notice of Investigation shall describe respondent's conduct which is the basis for the alleged violation of this rule.

7.6. The Notice of Investigation shall advise the respondent that the purpose of the investigation is to determine whether probable cause exists to believe a violation of the Code of Conduct for Administrative Law Judges has occurred which may subject the respondent to sanctions by the West Virginia Ethics Commission.

7.7. The Notice of Investigation shall also inform the respondent that he or she has the right to appear and make an oral response before the investigative panel if he or she reserves the right to make an appearance in writing within fifteen (15) days of the date of notice.

7.8. The Notice of Investigation shall also inform the respondent that he or she may respond in writing to the investigative panel within thirty (30) days of receipt of the notice, which time may be extended by the chairman of the investigative panel upon good cause shown by the respondent.

7.9. The Notice of Investigation shall also advise the respondent that his or her failure or refusal to respond to a fact or allegation is not taken as an admission of the truth of that fact or allegation.

§158-13-8. Investigation.

8.1. The investigative panel has forty five (45) days following the mailing of notice of investigation to consider:

8.1.a. The allegations raised in the complaint;

8.1.b. Any timely received written response of respondent;

8.1.c. Any oral response received from the respondent;

8.1.d. Other competent, relevant evidence submitted by any person to the commission; and

8.1.e. Other competent, relevant evidence gathered by the commission.

8.2. If the respondent requests an appearance before the investigative panel to present an oral response to the complaint, the investigative panel chairman will schedule a meeting to be held after the time has passed for the respondent to file a written response (within 30 days after the notice of investigation is received by the respondent). The respondent, his or her counsel, legal counsel to the commission and the commission investigator(s) may be present at the meeting.

8.3. The respondent has thirty minutes to make an oral response or statement of defense to the charges or allegation contained in the complaint. The respondent's testimony will be taken under oath or affirmation. The investigative panel, in its discretion, may allow the respondent additional time for the oral response. The investigative panel may either record the testimony electronically or employ the services of a court reporter to record and transcribe the proceedings, as necessary.

8.4. The investigative panel may seek additional probative information from the respondent as is necessary for its investigation.

8.5. The ethics commission and the investigative panel may issue subpoenas as is necessary and any subpoena issued has the same effect as one issued by a circuit court of the state.

8.6. The commission may seek enforcement of any subpoena issued by the commission or a hearing examiner as provided under this rule by applying to the Circuit Court of Kanawha County, through the issuance of a rule or an attachment against the respondent in a contempt case.

§158-13-9. Findings of Probable Cause.

9.1. If a majority of the investigative panel fails to find probable cause the proceedings shall be dismissed by order of the commission signed by a majority of the members of the investigative panel.

9.2. The commission order shall be signed by the majority members of the panel and copies of the order shall be sent to complainant and respondent within three days of execution of the order by the panel members.

9.3. If a majority of the investigative panel finds probable cause to believe that a violation under this rule has occurred the majority members of the investigative panel shall sign an order directing the commission staff to prepare a statement of charges and to schedule a hearing within sixty (60) days after the date of the order.

§158-13-10. Confidentiality Requirements.

10.1. The commission shall keep all matters or information received by the commission and the investigative panel relating to a complaint, including the identity of the complainant and respondent, confidential except as otherwise provided by this rule.

10.2. If the respondent agrees in writing to a release of information, the commission may disclose any information relating to a complaint or an investigation to the public at any time.

10.3. Upon a finding by an investigative panel that probable cause exists to believe that there has been a material violation of one of the prohibitions in this rule, the complaint and all reports, records, non-privileged and non-deliberative material used to determine probable cause of a violation are thereafter not confidential: Provided, That confidentiality of the information remains in full force and effect until the respondent has been served by the commission with a copy of the investigative panel's order finding probable cause and with the statement of charges.

10.4. After a finding of probable cause any subsequent hearing held for the purpose of receiving evidence or the arguments of the parties or their representatives shall be open to the public and all reports, records and non-deliberative materials introduced into evidence as well as the commission's orders, are not confidential.

10.5. The complaint as well as the identity of the complainant shall be disclosed to a person named as respondent in any complaint filed with the commission immediately upon the respondent's request.

10.6. The commission may release any information relating to an investigation at any time if the release has been agreed to in writing by the respondent.

10.7. The commission may order a person filing a complaint to be bound to confidentiality if the commission makes a finding that there is a reasonable likelihood that the dissemination of information regarding a pending or imminent proceeding will interfere with a fair hearing or otherwise prejudice the due administration of justice.

§158-13-11. Notice of Hearing.

11.1. If an investigative panel finds probable cause to believe a violation of this rule has occurred, the executive director shall serve respondent by certified mail, return receipt requested, a notice of the hearing at least forty-five (45) days prior to the date of the hearing.

11.2. The notice shall contain a statement of the charges, and provide the date, time, and place of the hearing.

11.3. Copies of the panel's order finding probable cause and the statement of charges shall be forwarded to the government agency where the respondent is or was employed or was under contract at the time of the events alleged as a violation of this rule.

§158-13-12. Continuances.

12.1. The scheduled hearing may be continued only upon a showing of good cause by either party prior to the hearing.

§158-13-13. Hearing Board and Hearing Examiner.

13.1. The commission members who have not served as members of the investigative panel in a particular case shall comprise a hearing board responsible for adjudicating the case. A hearing examiner shall be employed by the commission to preside at the taking of evidence at the hearing and issue a recommended decision. The hearing examiner shall be known as the "presiding officer" at the hearing as that term is used in these rules.

13.2. The qualifications of the hearing examiner shall conform to the requirements of this rule. Hearing examiners must be attorneys licensed to practice in West Virginia, with a minimum of three years experience in the practice of law.

13.3. The hearing examiner will be selected by the chairperson of the commission, subject to approval at the next meeting by a majority vote of the commission members present and voting.

13.4. The hearing examiner presiding at a hearing may:

13.4.a. administer oaths and affirmations;

13.4.b. compel the attendance of witnesses and issue subpoenas for witnesses as provided in this rule;

13.4.c. compel the production of documents and issue subpoenas duces tecum as provided in this rule;

13.4.d. examine witnesses and parties;

13.4.e. rule on offers of proof;

13.4.f. rule on evidentiary matters;

13.4.g. regulate the course of the hearing;

13.4.h. hold conferences for the settlement or simplification of issues by consent of the parties;

13.4.i. dispose of procedural requests or similar matters;

13.4.j. accept stipulated agreements;

13.4.k. take other action authorized by the ethics commission consistent with the provisions of this rule; and,

13.4.l. continue the hearing date upon motion of the respondent or commission where good cause is shown.

§158-13-14. Disqualification of Hearing Examiners.

14.1. A party seeking the disqualification of a hearing examiner must file a written, verified motion stating the facts and reasons for disqualification. The motion should be filed at least fifteen (15) days prior to a scheduled hearing or state, with particularity, why it is filed later.

14.2. The hearing examiner may disqualify himself or herself without a hearing or may refuse to do so and inform the parties that a hearing is necessary.

14.3. A member of the investigative panel assigned to the case shall be appointed by the commission chairman to hear and decide a motion for disqualification. The hearing shall be held no sooner than three days and no later than seven days after the motion is filed, unless the parties agree to a shorter or longer time period.

14.4. The party seeking disqualification of the hearing examiner may make a full record. The costs thereof, including the cost of court reporter services, witness fees and expenses shall be borne by the moving party unless the moving party prevails on the motion or makes a showing of indigence.

14.5. The investigative panel member assigned to hear the motion for disqualification shall issue a written decision on the motion as soon as practicable, but no later than seven days after the motion was heard. If a motion is granted the commission chairperson shall appoint a new hearing examiner no later than seven days after the decision on the motion is received. If the motion is denied the hearing examiner shall proceed to hear the case within the time frame set forth in the notice of hearing or, if necessary and upon a showing of good cause, shall reschedule the hearing to a later date.

14.6. The decision on the merits of a motion to disqualify a hearing examiner shall be considered interlocutory in nature and not subject to direct or immediate appeal, except that this rule shall not prohibit any party from seeking redress by appropriate extraordinary remedy.

§158-13-15. Prehearing Discovery.

15.1. Information which is exempt from discovery includes, but is not limited to the following:

15.1.a. any record, report, memorandum, or communication dealing with the internal practice, policy and procedure of the commission.

15.1.b. any record, report, memorandum, or communication of the staff or commission member regarding the institution, progress or result of an investigation of a complaint.

15.1.c. the work product of an investigator or other staff member made in the course of an investigation of a complaint, or in preparation for an investigative panel, or in anticipation of or in preparation for a hearing on the complaint.

15.1.d. any memorandum, statement or opinion prepared or directed to be prepared by legal counsel to the commission.

15.2. The parties shall exchange within twenty-five (25) days of the mailing and receipt of notice of the hearing to the respondent:

15.2.a. reports of experts to be used at the hearing;

15.2.b. a list of witness names, addresses, and telephone numbers as available to be used at the hearing;

15.2.c. copies of documents to be used at the hearing; and

15.2.d. results of any inspection of tangible objects to be used at the hearing.

15.3.a. Witness Statements -- At least seven (7) days prior to the hearing the parties shall exchange written and signed statements, tape recorded statements, and statements adopted by individuals who will be witnesses at the hearing which are within the respondent's or commission's possession.

15.3.b. If a party fails to comply with section 15.3.a of this rule to produce witness statements in a timely manner the hearing examiner shall bar that witness' testimony at the hearing unless good cause can be shown and the hearing examiner allows the witness' testimony.

15.4.a. Production of Witnesses -- Each party is entitled to compel through subpoena the attendance of any witness whose testimony may be relevant and material, except that a party is not entitled to the presence of a witness who is determined unavailable. A witness is unavailable in, but not limited to, the following situations:

15.4.a.1. The witness is not subject to compulsory process in West Virginia by reason of non-residence within, or prolonged absence from the State of West Virginia;

15.4.a.2. The witness is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

15.4.a.3. The witness is exempted from testifying by ruling of a circuit court on the ground of privilege from testifying.

15.4.b. Where a subpoena is issued at the instance of a party to the hearing, the cost of service, and the witness and mileage fee shall be borne by the party at whose request the subpoena is issued, at the same rate as paid to witnesses in state circuit court proceedings. The party who uses an expert witness at the hearing is responsible for payment of the appearance fee of the witness.

15.4.c. The presence of a witness may be obtained by the issuance of a subpoena requiring the attendance of the witness at the designated place, time and hearing date. A subpoena for a witness may be issued by the hearing examiner upon the written application of any party. It is the responsibility of the party

requesting the issuance of a subpoena to serve the subpoena on a witness by personal service or certified mail, return receipt requested.

15.5. Production of Documents -- Each party is entitled to compel through a subpoena duces tecum the production of documents which are relevant and material to the hearing. A subpoena duces tecum may be issued by the hearing examiner upon written application of any party. It is the responsibility of the party requesting the issuance of a subpoena duces tecum to serve the subpoena on the authorized records custodian by certified mail or personal service.

15.6. Depositions -- Depositions may be obtained by any party and used for evidentiary purposes.

15.6.a. Evidentiary objections may be made on the record during any deposition or at the time the deposition is offered into evidence.

15.6.b. It is not necessary that a hearing examiner be present at the deposition.

15.6.c. A party may be permitted to take a deposition of a witness, within or without the State of West Virginia upon written request to and approval by the hearing examiner. A request for deposition shall contain:

15.6.c.1. the name and address of the person whose deposition is requested;

15.6.c.2. a brief statement of the matters on which the person is to be examined; and

15.6.c.3. a brief statement of the reasons for taking the deposition in lieu of eliciting testimony at a hearing.

15.6.d. If approval is granted for the deposition, the party taking the deposition shall provide reasonable notice of the deposition to the person deposed, all parties, and their counsel of record.

15.6.e. The notice shall be in writing and contain the date, time and place of the deposition, as well as the name and address of each person to be deposed.

15.6.f. The cost of court reporter services, witness fees and expenses shall be borne by the party taking the deposition.

15.6.g. The deposition shall be taken in the manner proscribed by the laws of West Virginia for taking depositions in civil cases in courts of record except as set forth in this rule.

§158-13-16. Hearing Procedure.

16.1. The West Virginia Rules of Evidence shall be used in the hearing.

16.2. The complaint will be prosecuted by a member of the commission staff.

16.3. The hearing proceedings shall be electronically recorded or, the commission may employ the services of a court reporter to record and transcribe the proceedings by any means permitted in the circuit courts of this state.

16.4. Any party to a hearing has the right to be represented by an attorney duly qualified to practice in the State of West Virginia. No party may be represented at a hearing by a spokesperson, lay representative or anyone else not licensed or authorized to practice law in the State of West Virginia.

16.5. The respondent may appear without counsel and represent himself or herself at the hearing. At the beginning of the hearing the presiding officer shall insure the respondent does not desire to obtain counsel and is thoroughly advised of the sanctions which may be imposed in the event of a finding that the respondent committed a material violation of this rule.

16.6. All parties to hearings, their counsel, and spectators shall conduct themselves in a respectful manner. Demonstrations of any kind at hearings shall not be permitted. The presiding officer may, in his or her discretion, recess or continue any hearing in which the parties, attorneys, witnesses or spectators, conduct themselves in a disrespectful, disorderly or contemptuous manner which interferes with or prevents the proper conduct of the hearing.

16.7. All testimony to be considered by the presiding officer at the hearing shall be by sworn or affirmed testimony.

16.8. The purpose of the hearing is to further inquire into the matters set forth in the statement of charges, and to record evidence and arguments in support of and in opposition to the charges so that the commission may determine all issues.

16.9. Members of the commission and its officers, agents and employees are competent to testify at the hearing as to material and relevant matters: Provided, That no member of the commission who testifies at the hearing shall thereafter participate in the

deliberations or decisions of the commission with respect to the case in which he or she testified.

16.10. Each party may make a brief opening statement setting forth the evidence he or she intends to prove.

16.11. Initially the complainant or the commission's counsel shall present competent and relevant evidence, including testimony or documents, in proof of the statement of charges.

16.12. The respondent or his or her counsel may present competent and relevant evidence following the conclusion of the complainant's case.

16.13. Each party has the right to cross-examine any witness who testifies.

16.14. Following the presentation of the respondent's evidence the complainant has the right to submit rebuttal evidence.

16.15. Following the presentation of all evidence all parties have the right to offer oral argument to summarize the evidence presented, not to exceed ten (10) minutes for each presentation, unless for good cause the period is extended by the presiding officer.

16.16. All exhibits offered into evidence shall be labeled and marked as exhibits of the respective parties, such as "Complainant Exhibit," or "Respondent Exhibit".

16.17. All exhibits offered into evidence, or copies thereof, shall be appended to the record of proceedings, and if any exhibit is not susceptible to attachment or copying either a photograph, facsimile, or description of the exhibit may be substituted.

16.18. The presiding officer may order witnesses sequestered upon his or her own motion or on the motion of a party.

16.19. The respondent is entitled to be present and to present evidence at the hearing; however, the taking of evidence and a final determination of the issues shall not be prevented, and the respondent shall be considered to have waived the right to be present if:

16.19.a. after being notified of the date, time and place of hearing he or she does not appear, absent a prior showing of good cause, or

16.19.b. after being advised by the presiding officer that disruptive conduct will cause removal from the hearing, he or she

persists in conduct which justifies his or her exclusion from the hearing.

16.20. The cost of preparing a transcript of the hearing shall be borne by the party requesting it. Upon a showing of indigence by the respondent, however, the commission may provide a transcript of the hearing without charge.

§158-13-17. Findings of Fact, Conclusions of Law, and Briefs.

17.1. Any party, within fifteen (15) days from the conclusion of the hearing, may submit proposed findings of fact, conclusions of law and a brief containing argument. All proposed findings of fact, conclusions of law and briefs shall be filed with the West Virginia Ethics Commission at 1207 Quarrier Street, Charleston, West Virginia 25301.

17.2. Findings of fact shall be limited to the facts admitted into evidence at the hearing or made part of the record and any facts found through judicial notice.

§158-13-18. Decision by Hearing Examiner.

18.1. The hearing examiner shall prepare a recommended decision following the fifteen (15) day period after the hearing reserved to the parties to submit proposed findings of fact, conclusions of law and any briefs containing argument.

18.2. The hearing examiner has forty five (45) days from receipt of the proposed findings and conclusions from the parties to issue his or her recommended decision.

18.3. The hearing examiner shall serve copies of this recommended decision on the parties by certified mail, return receipt requested, and submit the recommended decision, along with the entire record, to the commission for final decision by the hearing board.

18.4. The parties may submit briefs to the commission's hearing board in support of or in opposition to the hearing examiner's recommended decision within fourteen (14) days of receipt of the recommended decision.

18.5. The commission's hearing board shall then have forty-five days (45) within receipt of the entire record to make a final decision on behalf of the commission.

18.6. Any party may request an opportunity to make an oral argument to the hearing board members prior to their deliberations on the hearing examiner's recommended decision and the imposition of appropriate sanctions, if applicable. The request must be made

in writing and submitted with the party's brief regarding the hearing examiner's recommended decision filed pursuant to section 18.1 of this rule. Oral argument shall not exceed ten (10) minutes for each presentation, unless for good cause the period is extended by the chairperson of the hearing board.

§158-13-19. Hearing Board Record.

19.1. The exclusive record for decision is:

19.1.a. the transcript or recording of testimony at the hearing;

19.1.b. exhibits introduced into evidence at the hearing;

19.1.c. all documents filed in the proceeding, and

19.1.d. the proposed decisions and any briefs submitted by the parties.

19.2. A party permitted by the commission to take and file an evidentiary deposition, or otherwise exercise discovery may make that part of the record.

§158-13-20. Final Decision.

20.1. All final decisions of the commission must be in writing and copies mailed within three days of the final decision by certified mail, return receipt requested, to all parties.

20.2. A final decision must be approved by at least six members of the commission's hearing board.

§158-13-21. Recusal of Ethics Commissioners.

21.1. Members of the commission shall recuse themselves from a particular case upon their own motion with the approval of the commission or for good cause shown upon motion of a party. The remaining members of the commission shall by majority vote, select a temporary member to serve in the place of a recused member.

21.2. The temporary replacement for a recused commission member shall be a person of the same status or category provided in W. Va. Code §6B-2-1(b) as the recused member.

§158-13-22. Sanctions.

22.1. In its final decision the commission may impose one or more of the following sanctions upon the respondent if it finds, by clear and convincing evidence, that one or more charges are true and constitute a material violation of this rule:

22.1.a. a written admonishment;

22.1.b. a cease and desist order;

22.1.c. an order of restitution of money, thing of value, or services taken or received in violation of this rule; and,

22.1.d. fines not to exceed one thousand dollars for each violation.

22.2. The commission may institute civil proceedings in the circuit court of the county wherein a violation occurred for the enforcement of sanctions imposed in its final decision.

22.3. In addition to the foregoing sanctions, the commission may recommend to the appropriate governmental body that the respondent be suspended or terminated from employment, removed from office, or disqualified from serving in the capacity of an administrative law judge either permanently or until such time as the respondent has completed an approved course of remedial training.

§158-13-23. Conciliation Agreements.

23.1. At any stage of the proceedings, the commission may enter into a conciliation agreement with a respondent if such agreement is deemed by a majority of the members of the commission to be in the best interest of the state and the respondent.

23.2. Any conciliation agreement must be disclosed to the public.

23.3. Upon acceptance of a conciliation agreement, a majority of the members of the commission may elect to impose one or more of the sanctions provided in the preceding section.

§ 158-13-24. Appeal.

24.1. The respondent may appeal final decisions of the commission involving the issuance of sanctions to the circuit court of Kanawha County, West Virginia, only upon grounds set forth in W. Va. Code §29-5-4.

§ 158-13-25. Immunity Absent Malicious or Fraudulent Complaints.

25.1. Any person, official, or agency who in good faith files a verified complaint pursuant to this rule shall be immune from any civil liability that otherwise might result by reason of such actions.

25.1.a. In the event a person files a verified complaint which is determined by the committee to have been made maliciously or fraudulently, either knowing that the statements contained therein

were not true, or in reckless disregard to the truth or falsity of material allegations contained in the complaint, the committee may impose one or more of the following sanctions on the complainant:

25.1.a.1. Make reimbursement to the respondent for reasonable actual costs incurred by the respondent;

25.1.a.2. Pay reasonable attorney fees incurred by the respondent;

25.1.a.3. Make reimbursement to the commission for the reasonable actual costs of investigation;

25.1.a.4. Decline to process any further complaints from the same individual until all monetary sanctions have been satisfied.

§ 158-13-26. Agency Code of Conduct.

26.1. Any agency may develop a code of conduct for its own administrative law judges, which shall supersede this rule, provided that the Ethics Commission determines that such agency code of conduct substantially complies with the objective of this rule.

26.1.a. If the commission grants a waiver authorizing an agency to develop its own code of conduct in accordance with this provision, a copy of any such code shall be retained in the Commission's offices and be made available to the public.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Code of Conduct for Administrative Law Judges

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Ethics Commission

Address: 4th Floor - Litton Building, 1207 Quarrier Street

Charleston, West Virginia 25301-1838

558-0664 FAX 558-2169

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ 27,207.00		00.00	27,207.00	\$ 27,207.00
PERSONAL SERVICES	\$ 25,600.00		00.00	\$ 25,60.00	\$ 25,600.00
CURRENT EXPENSE	\$ 900.00		00.00	\$ 900.00	\$ 900.00
REPAIRS & ALTERATIONS	00.00		00.00	00.00	00.00
EQUIPMENT	\$ 600.00		00.00	\$ 600.00	\$ 600.00
OTHER	\$ 107.00		00.00	\$ 107.00	\$ 107.00

2. Explanation of Above Estimates:

See attached

3. Objectives of These Rules:

The rule establishes a code of conduct for administrative law judges. It also sets forth a complaint process and provides penalties for violations.

Rule Title: Code of Conduct for Administrative Law Judges

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

The economic impact is discussed under section 1. A person who violates the code may be subject to a \$ 1,000.00 fine per violation. However, the decision of whether to impose a fine rests with the Ethics Commission. It is not expected that the collection of fines will be a significant source of state revenue.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

None anticipated.

C. Economic Impact on Citizens/Public at Large.

None anticipated.

Date: 6/28/04

Signature of Agency Head or Authorized Representative:

Lewis D. Bura

Attachment to Fiscal Note

Explanation of above estimates

Personal Services - this figure includes an estimate on the cost of investigative and paralegal services. The estimate is based in part on the number of complaints which required actual investigation by the West Virginia Judicial Investigation Commission (JIC). The JIC oversees Judges, Circuit Court Judges, Family Court Judges, Magistrates and Mental Hygiene Commissioners and enforces the code of conduct for these officials. The total number of individuals in these categories is 258. In 2003, the JIC received 234 complaints. The percentage of complaints per number of judicial officers for 2003 was 91 %.

Using the statistics from the JIC as a baseline, it is estimated that the Ethics Commission will receive 80 complaints. This number is calculated by taking 91 % of full-time administrative law judges and hearing examiners (84) for a total of 74 complaints. The figure then includes an estimate of approximately 6 additional complaints as there are also 47 part-time/contract hearing examiners who are employed by State agencies. Further there are other individuals who serve on commissions with adjudicatory responsibilities. These individuals may fall within the definition of a person covered by the rule.

The most significant expenses will be associated with complaints which require an investigation and/or hearing. According to the JIC 2003 annual report, of the 323 pending complaints in 2003, 46 required a formal investigation. The percentage is 14 %.

Applying this percentage to the number of full-time administrative law judges and hearing examiners employed by the State of West Virginia, it is estimated that approximately 15 would require a formal investigation. This number is calculated as follows: (1) 14 % of 84 full-time hearing examiners = 11.76; and, (2) 7 % of 47 part-time hearing examiners = 3.29.

Each investigation would require an investigator. The Commission currently contracts with an investigator. The cost of the investigator is \$ 40.00 per hour. If he spends 10 hours on each case, then the total projected cost would be \$ 7,200.00. (18 complaints x 10 hours per complaint x \$ 40.00).

In order to save on administrative costs, the Ethics Commission no longer employs a full-time paralegal. The Commission does employ the contract services of a paralegal. In order to assist the Commission in technology management, and in the organization of files and investigative materials, the estimated cost of paralegal services is \$ 3,750.00 (250 hours x \$ 15.00 per hour).

The rules also provide that if a complaint proceeds to hearing, then a hearing examiner will hear the case. The estimated cost for a hearing examiner is \$ 7,500.00. This figure is calculated based upon - 5 hearings x 20 hours per hearing x rate of \$ 75.00 per hour.

For the hearings, the services of a Court reporter would be required. These costs would

be in the range of \$ 1, 750.00. Last, the filing of complaints will in certain instances require an investigative panel and/or advisory panel to meet. The meetings may be on separate days from the monthly meeting of Commissioner. The per diem rate for commissioners is \$ 150.00 per day plus travel expenses. If an investigative or advisory panel meets 12 times per year, then the cost will be approximately \$ 5,400.00 for the commissioners (12 meetings x 3 commissioners x \$ 150.00 per diem cost). In addition the travel reimbursement expenses are estimated at \$ 400.00.

In conclusion a summary of other costs are as follows:

ACTIVITY	COST
Investigator	\$ 7,200.00
Paralegal	\$ 3,750.00
Court Reporter	\$ 1,750.00
Hearing Examiner	\$ 7,500.00
Per diem for Commissioners	\$ 5,400.00
TOTAL:	\$ 25,600.00

Current Expenses - Expenses would include: (1) travel expenses for commissioners for investigative and/or advisory panels - \$ 400.00; (2) office supplies - \$ 350.00; (3) Mailing costs - \$ 150.00. **Total = \$ 900.00**

Equipment - new filing cabinet. **Total = \$ 600.00**

Other - **Total = \$ 107.00** - The Ethics Commission was charged with the duty of promulgating a code of conduct for administrative law judges during the 2004 regular legislative session. If the Legislature adopts the rules, then the Commission will need to issue advisory opinions and to enforce the rule. In order to fulfill this task, it is necessary for the Commission staff to have access to resources on this subject matter. These resources and the associated cost would include:

Professional trade organization - American Judicature Society - Membership fee is \$ 75.00. Membership services include access to written opinions from other states interpreting the judicial code of ethics. The Administrative Law Judge Code of Ethics contains similar provisions. As states have only recently begun to adopt the ALJ Code of Ethics, the states will have to rely upon interpretations of the judicial code of ethics for assistance in interpreting the code.

Subscription to the Judicial Conduct Reporter - \$ 32.00 - a quarterly magazine which reports developments in judicial discipline.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 26, 2004

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Ethics Commission

1207 Quarrier Street, Suite 407

Charleston, West Virginia 25301-1838
558-0664

LEGISLATIVE RULE TITLE: Code of Conduct for Administrative Law Judges

1. Authorizing statute(s) citation W. Va. Code § 6B-2-5a

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 28, 2004

b. What other notice, including advertising, did you give of the hearing?

Mailed notice to all state agencies employing administrative law judges and hearing examiners;
issued press release; posted proposed rule on Ethics Commission website; provided notice
to W. Va. State Bar which sent E-mail notification to all subscribers; met with W. Va. State Bar
Administrative Law Committee

c. Date of Public Hearing(s) *or* Public Comment Period ended:

July 29, 2004

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached Yes No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 26, 2004

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Lewis G. Brewer
Executive Director
WV Ethics Commission

1207 Quarrier Street, Suite 407
Charleston WV 25301-1838

phone: 558-0664; fax: 558-2169

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

N/A

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

BRIEF SUMMARY OF COMMENTS RECEIVED; AGENCY RESPONSE; AND AMENDMENTS

The Ethics Commission received comments from nine agencies or individuals in response to the proposed legislative rule establishing a code of conduct for administrative law judges. The comments, agency response and any amendments are summarized below:

WV Office of Tax Appeals:

Comment 1: The rule should provide that when complaints are dismissed for lack of probable cause, and the investigative panel determines that the complaint was frivolous and vexatious, the complainant may be required to pay the respondent's reasonable costs and attorney fees for defending against a bad faith complaint.

Agency Response 1: The Ethics Commission agrees with this comment and has added language addressing malicious and fraudulent complaints.

Amendment 1: The rule was amended by adding § 25 in response to this comment.

Unemployment Compensation Board of Review Comments:

Certain comments expressed support for the rule as drafted. Those comments are omitted from the summary as no response or action is required.

Comment 1: The definition of "administrative law judge" in § 3.1 is so broad that it may encompass persons employed as "deputy commissioners."

Agency Response 1: The definition of "administrative law judge" in § 3.1 is quoted directly from W. Va. Code § 6B-2-5a. The Commission is not authorized to change language in the authorizing statute.

Amendment 1: No amendment made

Comment 2: The provisions in § 4.7 concerning political activities by administrative law judges may be too restrictive and unduly limit an individual's right to participate in the political process.

Agency Response 2: The provisions regulating political activity were taken from the W. Va. Code of Judicial Conduct, the American Bar Association Code of Judicial Conduct for Administrative Law Judges, and the National Association of Administrative Law Judges Model Code of Conduct. The rule was drafted in an effort to balance the need to avoid conduct that would create a potential conflict of interest against the individual's right to participate in the political process. Nonetheless, based on this and related comments the Commission modified two of the provisions in § 4.7, allowing a full-time administrative law judge to take a leave of absence to run for elected public office, and clarifying that part-time administrative law judges are not prohibited from running for or holding any elected public office.

Amendment 2: The rule was amended at §§ 4.7.b and 4.7.b.2 as a result of this comment.

Division of Corrections:

Comment 1: The definition of "administrative law judge" is so broad that it may encompass correctional magistrates in the prisons who will be subjected to frequent and frivolous complaints from inmates under their authority.

Agency Response 1: The Ethics Commission does not have authority to change the definition of "administrative law judge" established in the authorizing statute, W. Va. Code § 6B-2-5a. The Commission shares the concerns expressed relating to repeated frivolous complaints and added a provision addressing vexatious and fraudulent complaints.

Amendment 1: The rule was amended by adding § 25 in response to this and other comments.

WV Department of Environmental Protection Comments:

Comment 1: The definition of state "administrative law judge" in the rule was changed by adding the term "decisions" so that the rule provides for persons who issue "decisions, recommended decisions or reports" in place of the definition in W. Va. Code § 6B-2-5a which refers to those who issue "recommended decisions or reports."

Agency Response 1: Although the Ethics Commission does not agree with the effect attributed to the insertion of an additional word in the definition of "administrative law judge," the Commission agrees with the premise of the comment that a legislative rule may not modify specific language in the authorizing statute. Accordingly, the additional word was deleted.

Amendment 1: The rule was amended at § 3.1 in accordance with the comment.

WV Public Service Commission Comments:

Comment 1: As noted in the preceding comment, the word "decisions" was added to the definition of "administrative law judge" in 3.1.

Agency Response 1: Although the Ethics Commission does not agree with the effect attributed to the insertion of an additional word in the definition of "administrative law judge," the Commission agrees with the premise of the comment that a legislative rule may not modify specific language in the authorizing statute. Accordingly, the additional word was deleted.

Amendment 1: The rule was amended at § 3.1 in accordance with the comment.

Comment 2: The rule does not contain a provision authorizing agencies to develop a code of conduct for their administrative law judges as provided in W. Va. Code § 6B-2-5a(c).

Agency Response 2: The Commission agrees that the described provision should be added to the rule.

Amendment 2: The rule was amended by adding additional provisions as § 26.

Comment 3: Any additional provision providing that agencies may develop their own code of conduct for their administrative law judges should contain specific criteria which the Ethics Commission will apply in determining whether to approve the separate rule.

Agency Response 3: The Commission believes that waivers authorizing agencies to adopt a separate code of conduct should be addressed on a case-by-case basis. Including specific criteria in the rule at this time would unduly limit the Commission's discretion.

Amendment 3: No amendment made.

Comment 4: The requirements in §§ 4.3.b.4.B and 4.3.b.4.C may be inconsistent with specific statutory authority and court decisions applicable to members of the Public Service Commission.

Agency Response 4: The issue raised involves a particular matter that should be addressed through the advisory opinion process provided in § 5.1 of the rule.

Amendment 4: No amendment made.

Comment 5: The definition of “administrative law judge” in § 3.1 is so broad that it could be applied to management officials responding to employee grievances under the statutory grievance procedure for state employees at Levels I, II and III.

Agency Response 5: As previously noted, the Commission has no authority to modify the definition of “administrative law judge” contained in W. Va. Code § 6B-2-5a(a). Application of the rule to specific individuals should be addressed through the advisory opinion process provided in § 5.1 of the rule.

Amendment 5: No amendment made.

Comment 6: The provision in § 4.7.a of the rule concerning political conduct does not include commentary contained in the American Bar Association’s Model Code of Conduct for State Administrative Law Judges.

Agency Response 6: The rule explains in § 2.1 that the Commission will consider pertinent commentaries in interpreting the rule.

Amendment 6: No amendment made.

Comment 7: The provision in § 4.7.a.2 is not clear regarding whether administrative law judges are prohibited from purchasing tickets for political dinners or similar functions.

Agency Response 7: The rule is only intended to prohibit an administrative law judge from being compelled to make a payment to a political organization or

involuntarily purchase tickets to a political function. The punctuation was changed to reflect this intent more clearly.

Amendment 7: The rule was amended in § 4.7.a.2 in response to this comment.

Comment 8: The rule should permit a full-time administrative law judge to take a leave of absence in order to run for public office.

Agency Response 8: The Commission agreed with this comment and § 4.7.b. was amended accordingly.

Amendment 8: The rule was amended in § 4.7.b in response to this comment.

Anne Lambright Comments:

Comment 1: The provisions in 4.4.a.3 of the rule unduly restrict state administrative law judges from personally participating in fund-raising activities.

Agency Response 1: The provision at issue was taken from Canon 4 of the National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges in consultation with representatives of the West Virginia State Bar.

Amendment 1: No amendment made.

Comment 2: The language in 4.5.c.1.B appears to prohibit certain civic organizations from appropriately recognizing an administrative law judge's worthwhile contributions to their community.

Agency Response 2: The Commission agrees that the language as initially drafted is unduly restrictive. Therefore, the sentence stating that an administrative law judge should not be a guest of honor at a civic organization's fund-raising events has been deleted.

Amendment 2: The rule was amended by deleting part of § 4.5.c.1.B.

Carole A. Lewis Bloom Comments:

Comment 1: Part-time administrative law judges should not be prohibited by § 4.7 of the rule from holding an elected public office.

Agency Response 1: The language in § 4.7.b of the rule only restricts full-time administrative law judges from seeking public office. Nonetheless, in the interest of clarity, an additional provision was added allowing part-time administrative law judges to run for or hold elected public office.

Amendment 1: An amendment was made adding § 4.7.b.2.

WV Division of Motor Vehicles Comments:

Comment 1: The provision in § 4.1.d. of the rule permitting agencies to establish internal policies interpreting case law and statutory law should be expanded to include legislative rules and operational policies.

Agency Response 1: The Commission agrees with this comment and made changes to § 4.1.d.

Amendment 1: The rule was amended in § 4.1.d as suggested in the comment.

Comment 2: The provision in § 4.3.b.4.E. requiring the identity of the person responsible for the contents of the decision be included in the decision should be clarified to include the person responsible for holding the hearing and issuing the final order.

Agency Response 2: The Commission agrees with this comment and made appropriate changes to § 4.3.b.4.E.

Amendment 2: The rule was amended in § 4.3.b.4.E as suggested in the comment.

Comment 3: The rule should clarify that an administrative law judge should not be subject to undue or improper influence from the head of an agency whose decision is being reviewed.

Agency Response 3: The Commission agrees with this comment and made changes in § 4.3.b.9.

Amendment 3: The rule was amended in § 4.3.b.9 as suggested in the comment.

Comment 4: The provision in § 4.1.d of the rule should be inserted in § 4.3.c to emphasize an agency's authority.

Agency Response 4: The Commission notes that the rule will be interpreted in its entirety and it is not necessary to repeat a provision in multiple locations.

Amendment 4: No amendment made.

Comment 5: Notice of any disciplinary action or complaints should be sent to the employer of any administrative law judge.

Agency Response 5: Once a complaint becomes public in accordance with § 10.3 of the rule, copies of any final decision and other disclosable documents will be provided to an employing agency upon request.

Amendment 5: No amendment made.

Comment 6: A \$1000 fine establishes an excessive penalty.

Agency Response 6: The rule provides a maximum penalty of a \$1000 fine for each violation. The Commission believes that a maximum fine in this amount provides a viable deterrent to unethical conduct.

Amendment 6: No amendment made.

Comment 7: Will the remedies available include a remand or similar corrective action?

Agency Response 7: The penalties provided in the rule are directed at individuals who issue decisions and are not directed toward the outcome of a specific case. The Commission does not believe the complaint procedures should directly control the outcome of a particular matter decided by an administrative law judge subject to the rule.

Amendment 7: No amendment made.

Rebecca Sheppard Rodak Comments:

Comment 1: An introduction should be added to give the rule a context in which it will be interpreted.

Agency Response 1: The Commission believes the legislative intent in W. Va. Code § 6B-2-5a should not be supplemented through the rule-making process.

Amendment 1: No amendment made

Comment 2: The provision in § 4.3.a which provides that the judicial duties of an administrative law judge take precedence over all other activities is not clear. Perhaps there should be a reference to the National Association of Administrative Law Judge commentary.

Agency Response 2: The commentaries contained in the National Association of Administrative Law Judges Model Code of Judicial Conduct for State Administrative Law Judges and the American Bar Association Model Code of Conduct for State Administrative Law Judges are to be considered in interpreting the rule as stated in § 2.1. When considered in the context of the entire rule and the commentaries, the Commission believes the intent of § 4.3.a is reasonably clear. Any lingering ambiguity may be resolved through the advisory opinion process provided in § 5.1.

Amendment 2: No amendment made

Comment 3: The rule may be inconsistent with certain rights granted to state employees under W. Va. Code §§ 29-6-1 and 29-6A-1.

Agency Response 3: Those statutes are focused on the employment relationship. The Commission's role as an oversight agency under this rule would be parallel to its role in enforcing the WV Governmental Ethics Act on an even larger group of state employees.

Amendment 3: No amendment made

Comment 4: The requirements in § 4.3.b.3 of the rule appear to imply managerial responsibility when there is none.

Agency Response 4: The Commission believes the rule is reasonably clear that responsibility for the conduct of subordinates only exists when the administrative law judge has authority over their conduct.

Amendment 4: No amendment made

Comment 5: Are judges in the judicial branch excluded from classified service?

Agency Response 5: The definition in § 2.1 of the rule explicitly excludes anyone whose conduct is subject to the Code of Judicial Conduct promulgated by the West Virginia Supreme Court of Appeals from the provisions of the rule.

Amendment 5: No amendment made

Comment 6: The language in § 4.3.b.9 should be amended to better clarify the limitations on a "renegade judge."

Agency Response 6: The Commission agreed with this comment to the extent that additional language was added to § 4.3.b.9 prohibiting only "undue or improper" influence on an administrative law judge by an agency head, and additional language was added to § 4.1.d. authorizing agencies to adopt standard policies interpreting statutory, case law and legislative rules.

Amendment 6: Amendments were made in §§ 4.3.b.9 and 4.1.d. in response to this comment.

Comment 7: The rule should contain additional provisions in §§ 4.3.b. and 4.3.c. in regard to dealing with the mental illness or physical incapacitation of an administrative law judge.

Agency Response 7: The Commission believes that these issues are best addressed on a case-by-case basis through the advisory opinion or complaint process.

Amendment 7: No amendment made.

Comment 8: Does the prohibition in § 4.7.a.2 against being compelled to contribute to a political organization apply to "sunshine" or "flower funds"?

Agency Response 8: The rule is intended to prohibit compulsory political contributions including any mechanism which functions as a subterfuge for collecting mandatory political contributions.

Amendment 8: No amendment made.

Comment 9: The term "conciliation agreement" as used in § 23 of the rule should be defined.

Agency Response 9: The Commission believes that voluntary settlements of complaints are best encouraged by leaving the conciliation process as flexible as possible. The Commission prefers to determine whether an agreement represents an appropriate conciliation of a complaint on a case-by-case basis.

Amendment 9: No amendment made.

Comment 10: There are various inconsistencies between the complaints procedure under W. Va. Code § 6B-2-1 and the provisions in this rule.

Agency Response 10: The procedures in this rule were written, in consultation with the West Virginia State Bar, to apply in the context of administering a code of conduct for administrative law judges. There is no authority for amending another legislative rule, such as 158 C.S.R. 3, to explain that it does not apply to cases being processed under a subsequent rule.

Amendment 10: No amendment made.

WEST VIRGINIA OFFICE OF



TAX APPEALS

Comment #1

1012 Kanawha Blvd., East
Suite# 300
P.O. Box 2751
Charleston, WV 25330-2751

Telephone: (304) 558-1666
Fax: (304) 558-1670
R. MICHAEL REED
CHIEF ADMIN. LAW JUDGE

Thursday, July 08, 2004

Lewis G. Brewer, Esq.
Executive Director
West Virginia Ethics Commission
4th Floor, Litton Bldg.
1207 Quarrier Street
Charleston, WV 25301-1838

Re: Comments on Proposed Legislative Rule on
Code of Conduct for State Administrative Law Judges

Dear Director Brewer:

If, under section 9 of this proposed Code of Conduct, the investigative panel dismisses a complaint for lack of probable cause, the complainant should be required to pay the respondent's costs and reasonable attorney's fees, if any, within a stated time period, if the investigative panel also finds in its order of dismissal that the complaint was frivolous and vexatious. This mechanism would reasonably discourage such frivolous and vexatious complaints. Administrative law judges should not be spending their time defending such frivolous and vexatious complaints, at the expense of performing their normal tasks. In addition without such a mechanism, a very real potential exists for disgruntled litigants or their representatives to attempt to intimidate administrative law judges with the threat of filing frivolous and vexatious complaints requiring, unnecessarily, the judges' time and expense (or, perhaps, the state taxpayers' expense).

Sincerely,

R. Michael Reed
Chief Administrative Law Judge

RMR/jt

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WV ETHICS COMMISSION
2004 JUL 13 AM 9:38

Bob Wise
Governor

James Dillon
Chairperson

James E. Sago
Member

Carole A.L. Bloom
Member



Unemployment Compensation Board Of Review

Offices located at 1321 Plaza East, Charleston.
All communications should be addressed to the Board of Review
at the mailing address shown at the bottom of this page.

an equal opportunity/affirmative action employer

July 27, 2004

Lewis G. Brewer, Executive Director
W. Va. Ethics Commission
4th Floor Litton Building
1207 Quarrier Street
Charleston, West Virginia 25301-1838

RE: Proposed Code of Conduct for
Administrative Law Judges

Dear Mr. Brewer:

I am writing in response to the proposed Code of Conduct for Administrative Law Judges, Legislative Rule Title 158, series 13. The Board of Review employs eight Administrative Law Judges (ALJs) to adjudicate appeals in unemployment compensation cases. The Chief Administrative Law Judge of the Board of Review is responsible for supervising those ALJs.

Our unemployment insurance appeals process is based on the principle that independent, fair and competent ALJs will interpret and apply unemployment law consistent with the concepts of justice. We respect and honor our positions of public trust and support the concept of a code of conduct for Administrative Law Judges. We offer the following comments to the proposed code.

I. Practice of Law

Most of the ALJs employed by the Board of Review work part-time for the Board while maintaining private law practices. This situation works well because we are able to attract highly skilled lawyers who efficiently meet their adjudicative responsibilities. The ALJs readily disqualify themselves in any proceeding in which impartiality may be questioned, and the case is then assigned to another ALJ. We strongly support sections 4.5.f Arbitration and 4.5.g Practice of Law, of the proposed code which expressly allow such activities.

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WV ETHICS COMMISSION
2004 JUL 28 AM 11:41

II. Persons Covered by Code

Section 3.1 of the Code includes the definition of "state administrative law judge" which we believe is meant to encompass all of those in lower and higher authority unemployment appeals who have the statutory authority to preside over fact-finding hearings (our ALJs) or appellate proceedings (our three-member Board).

We are concerned that the definition is so broad, however, that an argument may be made that the deputy commissioners working at the local offices are covered by the code. These public employees perform administrative adjudications, make written decisions and conduct in-formal predetermination hearings in some cases. Ex parte communications do take place at this level as part of the fact-finding process. It is doubtful that the drafters of the legislation intended to cover these persons. Clarification on this point from the Ethics Commission to the Bureau of Employment Programs would be helpful. Daniel Light, Director of Unemployment, could provide additional information concerning the deputy commissioners. He may be reached at 558-2619.

III. Political Activities

We support section 4.7 of the proposed code which states that an ALJ shall refrain from political activity inappropriate to the office. An ALJ should understand the limitations on his or her political activities and comply with state and federal law and regulations concerning political activities.

Nevertheless, we believe the language in the proposed code concerning political activities of ALJs may be too restrictive and may unduly prohibit an individual's right to participate in the political process.

We see no compelling reason to prohibit political activity that neither affects the independent professional judgment of the ALJ nor the conduct of his or her official duties.

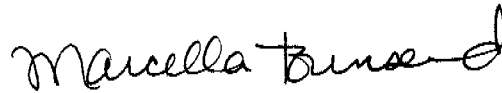
IV. Administrative Responsibility to Respond to Complaint

As Chief Administrative Law Judge, I receive an occasional complaint from parties concerning the conduct of an ALJ. We review each complaint and respond to the litigant as well as to the Judge. Pursuant to section 4.3.c.3 of the proposed code, we will continue to review these complaints initially. We support the code's provision calling for appropriate action for unprofessional conduct including internal disciplinary measures.

PAGE 3

We want to thank you and the staff at the Ethics Commission for all your work in addressing this issue.

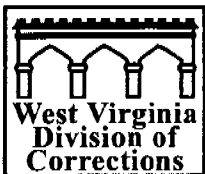
Sincerely,

A handwritten signature in black ink that reads "Marcella Townsend". The signature is written in a cursive, flowing style.

Marcella Townsend
Chief Administrative Law Judge

MT/mh

cc: Board Members
Quetta Muzzle, Acting Commissioner
Daniel Light, Director of Unemployment



BOB WISE
GOVERNOR

STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF CORRECTIONS

JIM RUBENSTEIN
COMMISSIONER



JOE MARTIN
SECRETARY

OFFICE OF THE COMMISSIONER
112 CALIFORNIA AVENUE-STATE CAPITOL COMPLEX
BUILDING 4, ROOM 300
CHARLESTON, WV 25305-0280
(304) 558-2036 Telephone - (304) 558-5934 Fax

July 6, 2004

Lewis G. Brewer, Executive Director
West Virginia Ethics Commission
4th Floor – Litton Building
1207 Quarrier Street
Charleston, WV 25301-1838

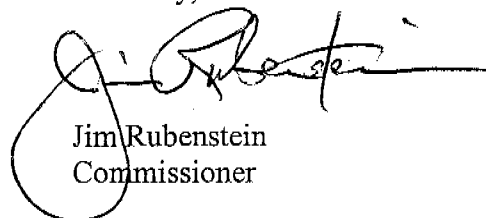
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WV ETHICS COMMISSION
2004 JUL 12 AM 9:33

RE: Proposed Rule – Code of Conduct for Administrative Law Judges

Dear Mr. Brewer:

Upon review of the Commission's Proposed Code of Conduct for Administrative Law Judges, it would appear that the said rule potentially encompass correctional magistrates and/or correctional hearing officers within this agency. As I am certain you are aware, the correctional magistrates are already subject to multiple lawsuits in both federal and state court by our prisoners. Consequently I would ask that the Commission consider excluding any correctional employee from your rules to avoid frequent and often frivolous complaints by these inmates.

Sincerely,



Jim Rubenstein
Commissioner

JR/smh



Comment #4

Executive Office
1356 Hansford Street
Charleston, WV 25301
304-558-5929
FAX 304-558-6576

West Virginia Department of Environmental Protection

Bob Wise
Governor

Stephanie R. Timmermeyer
Cabinet Secretary

July 27, 2004

Mr. Lewis Brewer
Executive Director
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

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WV ETHICS COMMISSION
2004 JUL 30 AM 10:40

Re: Code of Conduct for Administrative Law Judges
158 CSR 13 (Proposed)

Dear Mr. Brewer:

The West Virginia Department of Environmental Protection ("Department") is pleased to submit the following comment on the proposed rule governing the Code of Conduct for Administrative Law Judges.

Definition of State Administrative Law Judge

The definition of state administrative law judge ("ALJ") in the proposed rule is different and more expansive than the definition set forth in the statute authorizing the Ethics Commission to promulgate rules establishing a code of conduct for state administrative law judges. Pursuant to House Bill 4140, a state administrative law judge is defined as

Any public employee, public officer or contractor functioning as a hearing officer, referee, trial examiner or other position in state government to whom the authority to conduct an administrative adjudication has been delegated by an agency or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes rules . . .

See H.B. 4140 Enrolled, codified at W.Va. Code §6B-2-5a(a) (underlining added). This definition clearly states that ALJ's subject to the code of conduct are limited to those individuals that issue recommended decisions or reports, not those individuals that issue final decisions or reports. However, the proposed rule broadens the definition of ALJ by including those individuals that



West Virginia Department
of Environmental Protection

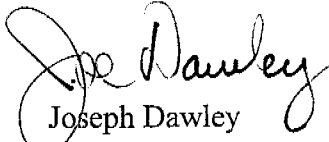
"Promoting a healthy environment."

Lewis Brewer
July 27, 2004
Page -2-

"issue decisions," which suggests those individuals that issue final decisions. *See* Proposed Rule, 158 CSR 13 § 3.1.

The Department recommends that the Ethics Commission adopt the statutory definition of "state administrative law judge" to avoid any confusion with regard to the applicability of the code of conduct. Thank you for this opportunity to comment.

Sincerely,



Joseph Dawley
General Counsel

JMD:jw

cc: Perry McDaniel



Public Service Commission

Richard E. Hitt, General Counsel

RECEIVED
WV ETHICS COMMISSION

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

2004 JUL 29 PM 3:42

Phone: (304) 340-0317
FAX: (304) 340-0372

July 29, 2004

West Virginia Ethics Commission
4th Floor, Litton Building
1207 Quarrier Street
Charleston, West Virginia 25301-1838

Re: Proposed Rule-Code of Conduct for
Administrative Law Judges
Proposed Legislative Rule Title 158, Series 13

To Whom it May Concern:

The following is intended to be the written comments of the Public Service Commission of West Virginia concerning the above-referenced proposed rules establishing a code of conduct for Administrative Law Judges.

1. The proposed rules must be altered to conform to legislative intent as demonstrated by the express language of the statute. A reading of the definition of "Administrative Law Judge" in the rules and the statute reveals that the rules have expanded the definition of "Administrative Law Judge" by including public officers and employees who issue "decisions". The statute does not include the term "decisions". The Commission submits that this is not an insignificant addition to the definition.

At the Public Service Commission, Administrative Law Judges issue recommended decisions by law. See, West Virginia Code §24-1-9. Those recommended decisions are not final orders of the Commission unless they become final as provided for in the statute. Parties to the case are entitled to file exceptions to recommended decisions. If exceptions are filed, the Commission may rule on the record before it; may hold a de novo hearing and render a final decision; or may remand the matter to the Administrative Law Judge Division for further hearings and recommendations. Also, a number of cases are kept by the Commissioners and when they issue a decision, it is a final order of the Public Service Commission. In the Commission's view, the definition of Administrative Law Judge has been expanded to include decisions issued by the Commissioners.

Re: Proposed Rule-Code of Conduct
for Administrative Law Judges
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It is fundamental tenet of administrative law that an agency cannot expand the scope of legislation through rulemaking. Clearly the statute defines the boundaries of a rulemaking and this proposed provision exceeds those boundaries.

2. The statute specifically states that the rules "shall provide that an individual agency may develop a code of conduct for its own administrative law judges, which shall supercede the general code of conduct established under this section, if the commission determines that it is in substantial compliance with the objectives of the code proposed by the commission." West Virginia Code §6B-2-5a(c). The proposed rules do not contain this provision and therefore are not in strict compliance with the statute. In addition to adding this provision to the rules, the Ethics Commission should develop express criteria by which an agency's proposed rules will be judged in determining whether or not it complies with the objective of the Ethics Commission's rules. The failure to develop such criteria creates uncertainty and the potential for arbitrary treatment.

3. If the final rules include the Public Service Commissioners as Administrative Law Judges, proposed sections 4.3.b.4.B. and 4.3.b.4.C. create uncertainty and confusion as to the ability of the commissioners to receive input from their policy advisors. The West Virginia Supreme Court of Appeals has held that the West Virginia Open Governmental Proceedings Act, Code §6-9A-1 et seq. does not apply to deliberations of the Commission in arriving at and issuing their decisions. APCO v. Public Service Commission, 162 W.Va. 839, 253 S.E.2d, 377 (1979). Furthermore, the Court has held that the Open Governmental Proceedings Act does not apply to consultation of Public Service Commissioners with Commission staff members. Id.

When the Public Service Commission assembles to discuss cases that it has heard, or have come to it by exceptions to an Administrative Law Judge recommended decision, it normally meets with a core group of advisors which include financial, engineering, and legal advisors. Although the one section of the proposed rules (Rule 4.3.b.4.C.) makes it clear that a judge can consult support personnel whose function it is to aid the judge in carrying out the judge's adjudicative responsibilities, the other rule (Rule 4.3.b.4.B.) provides that the judge can only obtain expert legal

Re: Proposed Rule-Code of Conduct
for Administrative Law Judges
July 29, 2004
Page 3

advice when notice is given to parties, of the substance of the advice and affords opportunity to respond. It should be made clear that this rule does not apply to the General Counsel of the Public Service Commission. If applied to Public Service Commission deliberations, would be contrary to holdings of the Supreme Court, violate attorney-client privilege, and seriously hamper the Commission in the performance of its statutory duties. Obviously, if the definition of Administrative Law Judge is changed to what the Public Service Commission believes is the legislative intent, and excludes the commissioners from the definition of Administrative Law Judge, this problem is solved. Otherwise, the Ethics Commission should recognize the problem and uncertainty created by these sections and modify them accordingly.

4. Literally applied, the current definition of Administrative Law Judge would seem to cover management within the State agencies who are responsible for hearing and issuing decisions at Level 1, 2, and 3 under the state grievance procedure for state employees. See, West Virginia Code §29-6A-1 et seq. Issuing grievance decisions is a minor duty compared to the other duties of the individual. Surely, the Ethics Commission does not intend that such individuals be subject to the Code of Conduct for ALJs. The rules should be modified to exclude any decisions issued by agencies in Levels 1, 2, and 3 of the grievance process.

5. Although the rules seem to track the ABA's Model Code of Judicial Conduct for State Administrative Law Judges with respect to political activities in the proposed rules 4.7.a., the Commission notes that the rules lack the commentary that is contained in the model rules developed by the ABA. The significant discussion in this commentary is the observation that the "participation in political activities is the right of every person. Unless specified in this canon or otherwise prohibited by law, political activity that neither affects the independent professional judgment of the State Administrative Law Judge nor the conduct of the judge's official duties is not prohibited". The rules seem to be at odds with the commentary. Furthermore, Rule 4.7.a.2 is confusing as to whether or not it is stating that an Administrative Law Judge cannot purchase tickets for political dinners or other similar functions or whether it is stating that an Administrative Law Judge cannot be compelled to purchase tickets for political dinners or other similar functions. The Public

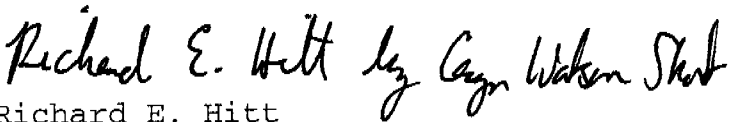
Re: Proposed Rule-Code of Conduct
for Administrative Law Judges
July 29, 2004
Page 4

Service Commission submits that this ambiguity and confusion should be clarified in the final rule. Also the rule fails to address the use of such tickets by an Administrative Law Judge if they are a gift. Furthermore, the rule should contain the commentary contained in the ABA Model Code of Conduct as well as the judicial Conduct developed by the National Association of Administrative Law Judges.

6. Proposed rule 4.7.B provides that an Administrative Law Judge shall resign from office prior to becoming a candidate in any election for public office. The Public Service Commission submits that an option should be added to this rule which would allow the Administrative Law Judge to take a leave of absence without pay if the agency is willing to agree to that option.

For the reasons stated herein, the Public Service Commission respectfully requests that the Ethics Commission make the aforementioned changes to its rules before they are submitted to the Legislature.

Sincerely,


Richard E. Hitt

REH/cbd

cc: E. H. Staats, Chairman
R. Michael Shaw, Commissioner
Martha Y. Walker, Commissioner

H:\CDODD\WPDOCS\RICKMISC\ETHICSCOMMISSION.wpd

Comment #6**ANNE WERUM LAMBRIGHT**

ATTORNEY AT LAW

P. O. Box 722
WILLIAMSON WEST VIRGINIA 25661
(304) 235-1938

P. O. Box 6023
CHARLESTON WEST VIRGINIA 25362
(304) 346-7580

July 25, 2004

Lewis Brewer, Esquire (via fax only) 558-2169
WV Ethics Commission
4th Floor Litton Bldg.
1207 Quarrier Street
Charleston WV 25301

RE: Code of Conduct - ALJ Legislative Rule proposed 158 CSR 13

Dear Executive ^{Lew}Director Brewer:

I have reviewed the proposed rule and have two (2) concerns on prohibitions in 4.4.a. (participating personally in fund-raising activities) and in 4.5.c.1.B. (speaker or guest of honor at a civic/charitable organization's charitable activities). Both of these prohibitions appear extremely draconian and would prevent organizations from recognizing the contributions to the community of deserving individuals (e.g. Spirit of the Valley, YWCA Women of Achievement, etc.) solely due to employment as an ALJ and could also hamper longstanding relationships between charitable organizations and ALJs, most of whom serve on charitable/civic boards that may raise funds from the public. It is my understanding that these prohibitions do not apply to state or federal court judges.

I also have one concern on the effect of 4.6 on part-time and/or contract judges. I am not sure what the term "limit" means in this context and would suggest clarification and/or a limitation of application to full-time ALJs.

Please feel free to contact me if you have any questions. I am at the Senate today and tomorrow.

Very truly yours,



Anne Werum Lambright

AWL/ym

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WV ETHICS COMMISSION
2004 JUL 27 AM 9:44

CAROLE A. LEWIS BLOOM

ATTORNEY AT LAW

POST OFFICE BOX 1652
CHARLESTON, WEST VIRGINIA 25326

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July 28, 2004

Lewis G. Brewer, Executive Director,
West Virginia Ethics Commission
4th Floor Litton Building
1207 Quarrier Street
Charleston, West Virginia 25301-1838

RECEIVED
WV ETHICS COMMISSION
2004 JUL 29 AM 10:45

Re: Proposed Rule-Code of Conduct for Administrative Law Judges

Dear Mr. Brewer:

I write in regard to the proposed Legislative Rule, Title 158, series 13, Code of Conduct for Administrative Judges. For many years, I have served as a contracted, part-time independent hearing officer for numerous state agencies and as a member of the Unemployment Board of Review. Over the years, I have concentrated my professional efforts in the area of West Virginia administrative law. Additionally, since 1997, I have served as the part-time Charleston Municipal Judge. I have successfully controlled any potential conflicts through careful management of my cases as prescribed by the Cannons of Ethics. In fact, it is my opinion that concentrating my practice in judicial or quasi-judicial roles has helped to insulate me from potential conflicts and any appearance thereof.

My primary concern with the proposed rule is that a clarification be inserted to specifically allow a part-time hearing officer to hold a part-time public office. My suggestion would be a clarification in Rule 4.7 stating, "nothing contained herein would prohibit a part-time administrative law judge from seeking or serving in an elective municipal or county office," or words to that effect.

Thank you for the opportunity to review and comment on these proposed rules. Please feel free to contact me if I may offer any additional information in this regard.

Very truly yours,



Carole A. Lewis Bloom

July 29, 2004

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WV ETHICS COMMISSION
2004 JUL 29 PM 3:13

Mr. Lewis Brewer, Legal Counsel
West Virginia Ethics Commission
1207 Quarrier Street, Suite 407
Charleston, West Virginia 25301

Dear Mr. Brewer:

Title 158 Legislative Rule, Series 13
Code of Conduct for Administrative
Law Judges

I am writing to make comments about the proposed legislative rules concerning the Code of Conduct for Administrative Law Judges.

As we discussed, the hearing examiners who work for the Division of Motor Vehicles are not lawyers and are not paid as lawyers. By agency policy, they are already required to follow the tenets of the Judicial Code of Ethics. However, I would like to request some minor changes to the proposed rules.

In Rule 4.1.d, I would request that you make the following changes:
“... from establishing policies interpreting case law, statutory law,
and legislative rules and from establishing operational policies.”

In Rule 4.3.b.4.E, I would request the following changes:
“Decisions of an administrative law judge shall clearly identify the person
or persons responsible for holding the hearing and issuing the final order
or decision....”

In Rule 4.3.c, I would request the following changes:
“An administrative law judge shall not be subject to undue or improper
influence from the head of an agency whose decision is being reviewed.
No provision in this rule prohibits an agency or administrative judiciary,
in the interest of uniformity and consistency, from establishing policies
interpreting case law, statutory law, and legislative rules and establishing
operational policies. The last sentence is just a repeat of Rule 4.1.d with
the changes I suggested to that Rule above.

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2004 JUL 29 PM 3: 14

Mr. Lewis Brewer
Page 2
July 29, 2004

In §158-13-19, I would request that notice of any disciplinary action or complaints be sent to the employer of any administrative law judge or hearing examiner. I would also request the reduction of fines found in §158-13-21. Although I do not expect any of the Division hearing examiners to violate these rules, they are not paid as attorneys, and sanctions of a \$1,000 fine would be financially devastating.

I would like clarification about the remedy available through the process contained in these rules. The relief, at best, should result in a remand hearing with a different examiner.

Thank you for all your help! If you have any questions or comments, please call me at (304) 558-4492.

Sincerely,

Jill C. Dunn
General Counsel

JCD/fb

cc: Commissioner F. Douglas Stump
Assistant Attorney General Janet James
Legal Section Manager Edward Janco
DMV Hearing Examiners (with copy of proposed rules)

Comments on Legislative Rule Title 158, Series 13

By Rebecca Sheppard Rodak 7/9/04

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2004 JUL 14 AM 9:06

I think the proposed rule has merit and will serve its intended purpose of protecting the administrative judicial system's integrity and independence. I do have a few suggestions regarding cross-referencing and clarification. I hope that they are somehow helpful.

158-13-1. Perhaps an introduction would be helpful to give the rules a context in which to be interpreted. Something akin to "These rules have been promulgated, at the direction of the Legislature, so that the integrity and independence of the administrative judicial system, and individual judges, can be safeguarded, while providing the parties involved in administrative litigation with a remedy to address unscrupulous administrative law judge behavior that jeopardizes this integrity and independence."

158-13-4.3.a. "The judicial duties of an ALJ take precedence over all other activities." What does this statement mean? If a comment in the National Association of Administrative Law Judges model explains, then perhaps this section could say, "Please see comment in NAALJ, cite or website, for further explanation."

There seems to be tension between this document and the rights given to state employees in *W. Va. Code* § 29-6-1, *et seq.* and 29-6A-1, *et seq.*, and their progeny of regulations.

- 158-13-4.3.b.3. appears to imply managerial responsibility, when often there is not any.
- 158-13-4.3.b.6. gives judges the power to make public comments in the course of their duties. I am sure many agencies have a policy against anyone not designated as an official spokesman making such statements. Perhaps there could be a statement added to the effect of, "unless otherwise prohibited by the employing agency."
- Am I safe in assuming that *W. Va. Code* §29-6-4(c) excludes judges in the judicial branch, and not executive branch, from classified service?

158-13-4.3.b.9. This addresses the independence of the administrative judiciary. There is always the possibility of a renegade judge. Perhaps a provision could be added, "However, this does not mean that the ALJ should simply substitute his or her opinion in place of the agency's opinion, in cases where the agency has not breached its legal perimeters. The agency's expertise should be respected within the bounds of established law."

158-13-4.3.b. and 4.3.c. I noticed there is no provision regarding mental illness or other incapacitation. Perhaps something would be appropriate along the lines of, "When a judge suffers from a mental illness or other incapacitation that interferes with his or her ability to properly perform his or her duties, then the Ethics Commission will encourage him or her to enter into a conciliation agreement wherein a course of treatment and improvement will be prescribed." The State Bar has similar provisions applying to attorneys; this would also apply to non-attorney adjudicators, particularly contract adjudicators not subject to agency personnel policies.

158-13-4.7.a.2. what does it mean to be "compelled to pay an assessment to a political organization?" Does this refer to a "sunshine" or "flower" fund? Maybe it could be explained. Surely this provision is not barring private political contributions by judges.

158-13-23. I think it would be appropriate to either define "conciliation agreement," or cite that part of the law wherein it is defined.

There also appears to be some tension between *W. Va. Code* § 6b-2-1, *et seq.* and its progeny of regulations, and this rule. 158-3-22. provides that costs are assessed against the complainant if the complaint is found to have been made in bad faith. Does this apply to ALJs? If it does not, would this be a case of "discrimination" under *W. Va. Code* § 29-6A-2(d)? Whether CSR § 158-3-1, *et seq.* applies to ALJs, or not, should be specifically stated.

Thank you for reading my comments.